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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 29.

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC COMPANY, *Appellee.*

BRIEF ON BEHALF OF APPELLANT.

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OCTOBER TERM, 1929.

No. 29.

ALICE BARBEE WICK, *Appellant*,

vs.

CHELAN ELECTRIC COMPANY, *Appellee*.

BRIEF FOR APPELLANT.

Statement of Facts.

The appellant, Alice Barbee Wick, is the owner of a tract of land of twelve hundred acres, which borders for a distance of approximately three and one-half miles on Lake Chelan, in the State of Washington, famous as being one of the most beautiful of the mountain lakes in this country, and regarded throughout the land as the equal of Lake Lucerne, Switzerland. She is a citizen of Pennsylvania, and resides in Philadelphia.

The Chelan Electric Co., which is a power producing company, closely allied to the Great Northern Railway Co., and owned by the Washington Power Co., an octopus of water power enterprises in the State of Washington, instituted a number of separate proceedings for the condemnation of the land on the borders of Lake Chelan, so that it might raise the waters of the lake and overflow the land adjacent to the shore, and erect and operate a hydroelectric power station for the purposes of converting the water power afforded by Lake Chelan and the Chelan River into electric energy.

One of these proceedings was that now before the court in which it sought to obtain by condemnation rights in approximately thirty-two acres belonging to appellant, which were the lake frontage of her twelve hundred acre tract.

It filed its petition alleging that it was necessary for the petitioner to maintain and operate a dam and reservoir for the storage of water at a maximum elevation of 1,100 feet above mean sea level, and to acquire the perpetual right to inundate and overflow to the maximum elevation of 1,100 feet above mean sea level "the following described real estate situate in the County of Chelan" (R. 8). Then followed a description of the entire tract of land of twelve hundred acres owned by the appellant, of which but thirty-two acres were later found to be affected by the overflow incident to raising the waters of the lake, but containing no description of the thirty-two acres actually sought to be taken. The petition also set forth that "the names of each and every owner, encumbrancer and person or party interested in the above-described property" were "Alice Barbee Wick and Chelan County, Wash-

ington, a municipal corporation." The petition prayed among other things that "upon payment thereof by the petitioner full title to said property shall be at once vested in the petitioner" (R. 9-10).

The petition was filed September 17, 1926, and the same day a notice was issued, directed to Alice Barbee Wick, that the petition and proof in support thereof would be presented to the court on the 11th day of October, 1926, for hearing and determination (R. 1). The following day a return was made by the sheriff that he had received a copy of the notice and petition to serve on Alice Barbee Wick, that he had made diligent search for and was unable to find her, and he certified upon information and belief that she was a nonresident (R. 10).

A copy of the notice was then published in a daily newspaper printed in the City of Wenatchee, Chelan County. The affidavit of publication is that it was published "once a week for a period of three consecutive weeks," during the interval between September 23, 1926, and October 7, 1926, inclusive, but without disclosing the days of publication (R. 15-16). No service of process or notice was given to the owner of the land other than this publication in an obscure newspaper in Chelan County, Washington.

Appellant, by special appearance in this case, sought to quash this service, contested the legality of the notice, the validity of the statutes for service on nonresident owners, and the jurisdiction of the court, and contended that by reason of the failure to serve her with notice the proceeding did not constitute due process of law under the Fourteenth Amendment of the Federal Constitution (R. 12).

She likewise sought to have the cause removed to the District Court of the United States, on the ground of the diverse citizenship of the parties (R. 19). An order for removal was granted and the cause duly removed to the District Court of the United States for the Eastern District of Washington (R. 24). The Chelan Electric Company moved to remand the cause (R. 25) upon the ground that the County of Chelan had levied taxes to the extent of $842.52 upon the entire tract of land, which were due and payable on or before the first Monday of February, 1927, and constituted a lien upon the land in favor of the County of Chelan, which was therefore a proper party respondent to the petition, and that this was sufficient to prevent the removal of the cause (R. 27).

The cause was remanded by the Federal District Court to the Superior Court of the State of Washington in and for Chelan County (R. 34). This action was apparently based upon the ground that the taxes had been levied and constituted a lien upon the land. At that time, however, while levied these taxes could not have been paid by the owner of the land, the policy of the State being to make the levy far in advance of the time of payment. The levy was made March 1, 1926. Taxes could not be paid before the first Monday in February, 1927 (Appendix 62). An order was entered denying her motion to quash, vacate and set aside the notice and the service of the notice (R. 41).

Appellant made a motion under a special appearance (R. 39), preserving her rights and exceptions to the ruling of the court previously made, to have the petition made definite and certain, so that it would set out with reasonable certainty the portion of the land

which the petitioner proposed to acquire, and, also, whether the petitioner sought to acquire a fee simple or merely an easement of flowage.

She at the same time, and under special appearance reserving her rights and exceptions, demurred to the petition (R. 37).

All points raised by her were adversely decided, and her motion to make definite and certain and her demurrer were overruled (R. 42-43).

Thereupon, the trial of the question of public use and necessity was held, an order was entered setting out the findings of fact (R. 45), and a conclusion of law that the public interest required a prosecution of the enterprise, and that the land sought to be acquired was necessary for the purposes of the enterprise, and authorizing the taking from Alice Barbee Wick "the right in perpetuity to inundate and overflow to the maximum elevation of 1,100 feet, still water measurement, above mean sea level, the following real estate." Then followed a description of the entire tract owned by Miss Wick (R. 63). Proper exceptions were taken, and a Writ of Certiorari was allowed by the Supreme Court of the State of Washington (R. 194). The case was there reviewed and the lower court affirmed (R. 149).

The opinion of the Supreme Court of the State of Washington delivered upon this proceedings in certiorari is printed in the record (R. 142).

Without awaiting the decision of the Supreme Court of the State of Washington upon the certiorari proceedings, the Superior Court of Chelan County proceeded with the hearing of the case. The findings of fact and conclusions of law upon the question of public use and necessity were signed in open court March 24,

1927 (R. 62). The petitioner noted the case for setting for trial at the April term, 1927, first on Saturday, the 2nd of April, 1927 (R. 64), and later for Saturday, April 30, 1927 (R. 75). Notwithstanding the fact that a motion to make more definite and certain made by appellant had been denied (R. 43), a bill of particulars was filed April 27, 1927 (R. 75), after a decree of public use and necessity had been made (R. 62).

Appellant moved in the Supreme Court of the State of Washington for a stay of the proceedings (R. 82), and on June 23, 1927, the stay of proceedings was denied (R. 86). The case went to hearing and the petitioner having called witnesses and rested, the appallant on June 27, 1927, presented a petition for removal of the proceeding to the Federal Court, and the proper bond and an accompanying affidavit, setting out as the ground for removal that there was no evidence introduced or offered on behalf of the petitioner showing any interest of the Chelan County in the controversy. A copy of this petition, bond and affidavit were served upon the petitioner, and were then handed to the clerk of the court, filed and presented to the court in the courtroom in which the case was being tried (R. 86-95).

The following day, the 28th of June, 1927, after argument, an order was signed denying the petition for removal (R. 95).

Thereafter, the hearing of the cause proceeded and certain instructions were submitted to the jury on behalf of the appellant which the court refused (R. 95-98), and thirty-six instructions were submitted on behalf of the petitioner which the court granted (R. 98-114). Exceptions were duly noted by appellant (R. 115-121) (R. 122-125). An award was made by the verdict of

the jury. Judgment was rendered on the verdict (R. 125-133), and at the same time a decree of appropriation was signed reciting the deposit of the amount awarded by the jury with the clerk of the court and decreeing that there was vested in the Chelan Electric Company "the following described property, lands and premises," and then follows a lengthy description by metes and bounds of the property, and a further decree releasing the Chelan Electric Company from all liability for damage growing out of the impounding and storing of the waters of the lake and raising the same to the maximum elevation of 1,100 feet still water measurement, and granting to the Chelan Electric Company right of possession (R. 134-141).

Proper exceptions were noted and an appeal taken to the Supreme Court of the State of Washington (R. 142). Upon the hearing the Supreme Court of the State of Washington affirmed the judgment below (R. 149). The opinion of that court upon this appeal is set out in the record (R. 202).

The record shows by the findings of fact made by the judge of the Superior Court of Chelan County the following uncontroverted facts: The entire capital stock of the Chelan Electric Company except the qualifying shares of five members of the Board of Trustees, each holding one share, is owned by the Washington Water Power Company, a twenty million dollar power concern affiliated with the Great Northern Railway Company, and the owner of five hydroelectric plants in the State of Washington, and through a subsidiary company the owner of another hydroelectric plant in the State of Washington, and the owner of a hydroelectric power plant in the State of Idaho (R. 53-55). That it has been selling and transmitting energy into

the State of Idaho from the State of Washington (R. 56). All of its power plants are connected together by high voltage transmission lines. The court also further states that "the electric energy to be generated in said new plant (Chelan Electric Company) will be delivered to the Washington Water Power Company at the switchboard of said new plant for transmission by the Washington Water Power Company to its customers in the State of Washington (R. 56).

Specification of Assigned Errors Intended to Be Urged.

1. The notice by publication to appellant, Alice Barbee Wick, did not constitute due process of law under the provisions of the 14th Amendment to the Constitution of the United States.

Assignments of Error I, II, III, VII and VIII.

2. The statute of the State of Washington, providing for service on non-residents in condemnation cases by publication (Remington's Compiled Statutes, Ed. of 1922, Sec. 922), is in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error VII and VIII.

3. The statutes of the State of Washington, under which the condemnation of the land was sought, are in conflict with Article III, Section 2, paragraph 1, and Article IV, Section 2, and the 14th Amendment of the Constitution of the United States.

Assignment of Error VIII.

4. The purpose for which the land was sought to be condemned did not constitute a public use, and that accordingly appellant's land was taken contrary to the 14th Amendment to the Constitution of the United States.

Assignment of Error IX.

5. The statutes of the State of Washington, permitting the property of this appellant to be taken for the use for which the Chelan Electric Company proposes to take appellant's property, permit the taking of land for a private use, and are, therefore, in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error II, IX.

6. The petition contained no adequate description of the land to be taken, nor did it disclose whether the corporeal property or an easement was to be acquired, and for this reason the proceeding was contrary to the 14th Amendment and to Article III, Section 2, paragraph 1, and Article IV, Section 2, of the Constitution of the United States.

Assignments of Error I, II, XIV, XVI.

7. The extent of the land appropriated was in excess of that sought in the petition and authorized by the Federal Power Commission.

Assignments of Error XIII, XVI.

8. The court erred in instructing the jury that the Electric Co. were seeking only an easement, and that appellant would retain all rights and privileges incident to ownership not inconsistent with an easement.

Assignment of Error XIV.

9. The court erred in permitting the Chelan Electric Co. to file a bill of particulars after a motion for a bill of particulars had been denied, and after the order for public use and necessity had been entered.

Assignment of Error XII.

10. The court erred in refusing to find that the instructions to the jury granted, were argumentative and conflicting, and in refusing to grant the instructions prayed by appellant.

Assignment of Error XV.

11. The statutes of the State of Washington, providing that taxes upon real estate are a lien upon the land one year before they are permitted to be paid, are in conflict with Article III, Section 2, paragraph 1 of the Constitution of the United States.

Assignments of Error IV, VI.

12. The appellant was improperly deprived of her right to have the cause removed to a Federal Court.

Assignments of Error V, X, XI and XII.

Summary of Argument.

1. Sufficiency of the Notice to Constitute Due Process of Law.
   a. No authoritative definition of due process by the court.
   b. Due process involves a full notice of the proceeding and an opportunity to defend.
   c. Extra-official, or casual notice does not constitute due process.
   d. The notice that was given in this case.
   e. The ordinary interpretation of the statute would have required the notice of twenty-four days, but this was shortened by the holding of the Supreme Court of the State of Washington that the notice actually given in the case was sufficient.
   f. The decision of the lower court involved necessarily the holding that the notice and publication of notice, required by the statute, could be given simultaneously.
   g. The lower court treated the statute as though service of the notice became effective the first day of publication.
   h. The statute is either constitutional or unconstitutional, and the time fixed by the statute is either reasonable or unreasonable.
   i. Cases of this court are cited to the effect that the notice uncalled for by the statute is not material.
   j. The length of notice necessary for appellant under the facts of this case discussed with the conclusion that two weeks' notice was not sufficient.
   k. Cases in this court upholding statutes of publication in which the shortest time is four weeks are cited.

l. Process of taxation does not require the same notice required in a suit at law.

m. Whether the statute only required publication once a week for two successive weeks, or such publication for two successive weeks and then ten days' notice, there has been no adequate notice given appellant, either because the statute has not been complied with, or the statute failed to provide a reasonably adequate notice.

2. Whether the Purpose of the Taking Constituted a Public Use.

a. The finding that all electrical energy was to be delivered to the Washington Water Power Co. at the switchboard of the Chelan Electric Company's plant.

b. The Chelan Electric Co. had no transmission lines.

c. It was a producing company generating power for its own profit, without the right or ability on the part of the public to purchase.

d. The meaning of "public use," and the necessity of a right on the part of the public, independent of the mere will or caprice of the owner, to the use of the property.

e. Private property cannot be taken by eminent domain for the private use of another, with the citations from the opinions of this court.

f. The effect of the decision of Clark vs. Nash, and Strickley vs. Highland Boy Mining Co., and the doctrine of special circumstances requiring concessions.

g. There were no exceptional circumstances in this case.

h. The scheme is a commercial one without benefit to the public, and solely for the profit of the Chelan Electric Co.

3. Were the Proceedings Otherwise Defective to the Extent that they failed to Constitute Due Process of Law?

a. The description of the land in the petition, being all of the land owned by appellant, did not advise her of the land to be taken.

b. The description should be as accurate as in the case of a deed of land so that a surveyor could locate the land without extrinsic evidence.

c. After the petition was filed and notice published the element of still water measurement and damages for wave wash and erosion were introduced for the first time into the case.

d. The judgment gave the Chelan Electric Co. an easement of greater extent than was sought in the petition.

e. The instructions granted to the jury were complicated and argumentative, and contradictory, and did not fairly set forth the rules of law governing the condemnation of land.

f. No understandable definition of fair market value is given.

g. The jury were prevented from considering the worth of the land to the petitioner for reservoir or other purposes.

4. Whether the Tax Statutes Are in Conflict with the Constitution of the United States.

a. The lien attaching at the time of assessment in March on taxes not payable until the first Monday of February of the succeeding year, violates the Constitution of the United States.

b. The exception of the statute as to the grantor and grantee was applicable to condemnor and respondent.

c. The reason why the lien did not attach between grantor and grantee.

d. The part played by the tax laws in preventing the removal of the case from the state court to the federal court.

e. The County of Chelan had no interest in the land of appellant, and was not a necessary or proper party.

f. Appellant, being a citizen of the State of Pennsylvania, was entitled to a removal of her case to a federal court, and to deprive her of this right is in violation of the Constitution of the United States, Art. III, Sec. 2, and also the due process clause of the 14th Amendment of such Constitution.

g. The petition showed no interest in Chelan County, no relief was asked with regard to Chelan County, and no judgment was rendered with regard to Chelan County.

h. The interest ultimately taken by Chelan County was only an easement and, therefore, could not not have been affected by the existence of a lien for taxes.

Argument.

1. *Sufficiency of Notice to Constitute Due Process of Law.*

Specification of Assigned Errors Nos. 1, 2 and 3. Assignments of Error I, II, III, VII and VIII.

This court has on many occasions considered the sufficiency of notice to constitute due process of law

within the provisions of the Fourteenth Amendment of the Federal Constitution to the effect that "nor shall any state deprive any person of life, liberty, or property, without due process of law." Munn vs. Illinois, 94 U. S. 123; Davidson vs. New Orleans, 96 U. S. 97; Raymond vs. Chicago Union Traction Co., 207 U. S. 20.

The court has adopted the policy not to define due process of law, but has held that the meaning of the term should be ascertained by the actual process of judicial inclusion or exclusion, as the cases presented for decision require. Davidson vs. New Orleans, 96 U. S. 97; Twining vs. New Jersey, 211 U. S. 78.

The protection of the Federal Constitution applies whatever the form in which the legislative power of the state is exerted, whether by a constitution, an act of legislature, or any act of any subordinate instrumentality. Standard Scale Co. vs. Farrell, 249 U. S. 571.

One of the essential requirements of due process of law, where a court proceeding is involved, is full notice of the proceeding and an opportunity to defend. Standard Oil Co. vs. Missouri, 224 U. S. 270.

Extra official, or casual notice, or hearing granted as a matter of favor or discretion, cannot be deemed a substitute for the due process of law that the Constitution requires. Coe vs. Armour, etc., 237 U. S. 413.

The statute of the State of Washington, Session Laws 1890,: page 295, Sec. 2 (Remington's Compiled Statutes, Sec. 922) provides as follows:

> "A notice stating briefly the objects of the petition and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to

> the court, or judge thereof, shall be served on each and every person, named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein if a resident of the state, * * * In all cases where the owner, or person claiming an interest in such real or other property, is a nonresident of this state, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated once a week for two successive weeks; * * * and such publication shall be deemed service upon each of such nonresident persons * * *."

The statute is set out in full, Appendix 55.

A notice was issued September 17, 1926, directed to the appellant, and the time of presentation to the court was fixed as October 11, 1926, at nine-thirty A. M. The appellant being a nonresident, no personal service was made, but between September 23, 1926, and October 7, 1926, three publications of this notice were made in a daily paper. The Supreme Court of the State of Washington has held that this was a proper service, and did not violate the Fourteenth Amendment of the Constitution. It is contended by appellant that the law as administered is contrary to due process of law.

There are two distinct things provided by this statute: the first is a notice to be served at least ten days previous to the time of hearing; the second is publication of that notice, once a week for two successive weeks, which is to be deemed service upon a nonresident.

Under the ordinary interpretation of this statute, the publication would have been made for a full two weeks, or fourteen days, from the 23rd day of September, 1926, the first day of the publication, and ending on the 7th day of October, 1926. This would have amounted to service of the notice and then should have followed the ten days fixed by law as the length of the notice. The case should not have been heard before October 17th, 1926, or ten days after complete service of the notice had been made. Service was not made until publication was complete. The service was of a ten days' notice, and no action could be had or hearing fixed before ten days after the last day of the two weeks' publication.

We assume that publication was complete October 7, 1926. After that there were but four days given the appellant to appear and answer, the case being set for October 11th. That time was too short to constitute due process of law under the decisions of this court. Roller vs. Holly, 176 U. S. 398. It is apparent, therefore, that this ordinary and usual interpretation of the statute was not adopted by the court. It would have required a hearing not earlier than the 17th day of October. The date fixed in the notice for the hearing was the 11th of October, and, therefore, the whole proceeding would have been void as not complying with the statute, and for that reason depriving Miss Wick of her property without due process of law. The Supreme Court of the State of Washington could not have failed to find that the law had not been complied with and that jurisdiction to hear the case was lacking in the court of first instance because the appellant had not been brought into court.

But the Supreme Court of the State of Washington rejected this obvious interpretation of the statute and

in citing the statute avoided citing the words "at least ten days previous to the time designated in the notice." From reading the statute as quoted by the court in its opinion it would appear that the legislature had left the length of the notice to the discretion of the court and had only required that it be published once a week for two successive weeks. Indeed, this is what the court said the statute meant.

The language used by the Supreme Court of the State of Washington is as follows:

> "Under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable notice to a nonresident and opportunity to be heard."

And again:

> "Our statute says nothing whatever about a return day, but only the number of publications of notice, where publication must be had. The return day not being regulated by statute as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?

While it seems incredible that the Supreme Court of the State of Washington could have failed to realize that the statute did fix the length of the notice, and that it was not dependent upon the discretion of the court, we submit that its opinion speaks for itself.

While it is true that the statute did not fix a technical "return day," it did provide for a ten days' notice before the day fixed for hearing. The conclusion is inevitable that the ten days of the notice and the two weeks of publication might run concurrently. This is what the Supreme Court of the State of Washington holds that the statute means.

The Supreme Court of the State of Washington has treated the statute in question as though the service dated from the first day of the publication and all that was necessary was that a reasonable time should be given to nonresidents within which to appear. In other words, they have held that the statute only required publication once a week for two successive weeks, which might be satisfied by a publication on two days, eight days apart, and a hearing not earlier than ten days from the first publication. In its opinion the court said:

> "Other than the matter of the description of the property hereinbefore discussed, the argument is that the two weeks' publication of notice provided for by statute is unreasonably short to constitute due process of law. A great number of authorities are cited by each side upon this important point. They have been examined but we do not find it necessary or practical to cite or discuss all of them. Counsel for the relator has called attention to authorities deciding the number of publications and intervening time necessary to satisfy a statute requiring publication for a given number of successive weeks. But that is not the question here where under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable no-

tice to a nonresident and opportunity to be heard. The case nearest in point cited, quoted from and apparently relied on by this relator is Roller vs. Holly, 176 U. S. 398, 44 L. Ed. 520. In that case it was held that a nonresident defendant who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within five days of date of service of citation, was not furnished due process of law. That is, the time under the circumstances was unreasonably short. But we may and of course do agree with that case and still it does not lead to the striking down of our statute that is complained of nor to a holding that the notice in the present case was unreasonably short. Counsel argues, as we understand, that because our statute speaks of two weekly publications, that it means eight days' notice and that that length of time under the circumstances in this case does not furnish due process of law under the doctrine of the Roller case. That case speaks of the date of service with relation to the return day. Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?"

We see nothing in the statute which fixed eighteen days as the length of notice to nonresidents; we see nothing in the statute which leaves to the discretion of the court the amount of time of such notice; we see

nothing in the statute which says that the length of publication shall be the length of notice to which nonresidents are entitled. The statute is positive and unambiguous in that it fixes the amount of notice at least ten days, and the time of publication of such notice as once a week for two successive weeks. Since the Supreme Court of the State of Washington has held that the nonresident is not entitled to the two weeks and the ten days consecutively, the amount of notice fixed by the statute is either ten days, or a publication once a week for two successive weeks. Neither ten days' notice nor a publication twice in successive weeks, we confidently assert, constitute due process of law.

The point made by the Washington court, viz., that eighteen days' notice had actually been given is not controlling. It is not what notice was given irrespective of the provisions of the statute, but what notice appellant was entitled to under the statute which will determine whether due process of law was secured to appellant.

The Chelan Electric Co. argues that eighteen days' actual notice was given, and that regardless of what the statute required, eighteen days would be sufficient to constitute due process of law, and as part of this argument it is implied that, even if the statute provided for a shorter notice, and for that reason was unconstitutional, the fact that eighteen days' notice was actually given would cure the defect.

The Supreme Court of the State of Washington upheld this contention (R. 146), and said:

> "The return day not being regulated by statute as was the case in Roller vs. Holly, *supra*, it is fixed independently of it so that the ques-

> tion in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the day of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?"

Answering this contention, we assert that the statute is either constitutional or unconstitutional. If unconstitutional, by reason of the fact that it does not provide a sufficient notice, it is wholly void and affords no ground for service by publication, and hence the proceedings taken under the void statute are entirely irregular and did not constitute due process of law. If there was no constitutional statute authorizing the Chelan Electric Co. to proceed against Miss Wick, a nonresident of the State of Washington, by publication, for the reason that the notice provided in the existing statute of the State of Washington pertaining to such publication, is unreasonable and arbitrary, then although they published a notice once a week for a year no service upon the person of Miss Wick could be obtained.

No litigant, no judge, no court can make a void law valid by doing something which the void law does not require, but which if the law did require to be done, would have made the law itself a valid law. In this case there is no service except so far as there was a valid one by publication. If the statute authorizing service by publication does not afford due process of law, then no notice has been given appellant. Suppose the statute had required only two days' notice but actually notice of one complete month had been given. Certainly it cannot be contended that a statute is made valid by the fact that its provisions are ignored and a more liberal notice, not required by the statute, has

been given. This court has forever settled that contention. In the case of Roller vs. Holly, *supra*, it said:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

In Louisville, Nashville R. Co. vs. Stockyards Co., 212 U. S. 132, it was said:

> "The law itself must save the parties' rights and not leave them to the discretion of the court as such."

In Security Trust Co. vs. Lexington, 203 U. S. 233, it was said:

> "It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided by the statute."

And in Coe vs. Armour Fertilizer Works, 237 U. S. 413, it was said:

> "Nor can extra-judicial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

In Southern Railway Co. vs. Simon, 184 Fed. 959, it was said.

> "But it is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense."

In sustaining the service on appellant and in construing its statute as it did to require, so far as a non-resident land owner was concerned, no notice or service other than a publication of notice once a week for two successive weeks, which publication could be made simultaneously or concurrently with the ten days' notice, the Supreme Court of the State of Washington has made it possible to have a valid service of process for hearing by giving a notice of ten days, publishing it twice at an interval of eight days within the ten days, and having the hearing either at the expiration of ten days from the first publication of the notice, or at most at the expiration of fourteen days from the first publication of the notice. Under the decisions of this court we do not believe that this amounts to due process of law.

What is, or what is not, due process of law is, in part, dependent upon the facts of each case, and the facts of the case at bar are such as to have required a considerable time by way of notice for these reasons: The land was a large tract of which only a very small portion was affected by the condemnation proceeding; the petition described the entire tract of twelve hundred acres, and only described the part to be taken by reference to a maximum elevation of the water of the lake to 1,100 feet above mean sea level;

There were several serious questions of fact and of law presented, which required investigation and study before a reasonable defense could be undertaken. According to the admission of the Chelan Electric Co. (R. 85) the trial involved a large amount of expert testimony, including experts on the question of erosion of the soil due to wave wash, the expense of constructing docks to meet the new conditions upon the

lake, and the value of the land affected by the enterprise of the petitioner;

To have ascertained what portion of this land was to be taken or affected required the establishment of a datum plane, and the engineering incident to a topographical survey of the tract; there were consequential damages to the remainder of the property not taken which were the result of the taking;

The defendant resided in the city of Philadelphia, entirely across the continent from where the land was located; it was a journey of five days between her home and the City of Wenatchee, where the property was located and where the court met. She was a citizen of the State of Pennsylvania, and under the Constitution and statute was entitled to have this case transferred to a Federal Court. Some preparation was needed for a trip of this character, and consultation with counsel and experts was reasonably necessary before undertaking the defense of such a proceeding. The removal of the cause to the Federal Court required the preparation of a petition, giving of bond, and notice to the Chelan Electric Co. of the application for removal. In condemnation cases the petitioner has always had a long period of time in which to prepare for the bringing of the suit, and a respondent can by no means meet him on equal terms where his appearance in court is summarily ordered in ten days, and at a distant place. Even if personal service had been made upon her in Philadelphia, ten days before the day fixed for the hearing, the time was too short to be reasonable, but here no personal service was made, and in lieu thereof a publication of notice was substituted.

Some slight reviewing of the decision of this court develops the following holdings:

In the case of Huling vs. Kaw Valley R. & Improvement Co., 130 U. S. 559, the court upheld a statute providing for publication thirty days before the time fixed for hearing in a suit to condemn land.

In the case of Ballard vs. Hunter, 204 U. S. 241, in a suit to enforce collection of levee taxes, it was held that four weeks' notice by publication was adequate.

In House vs. Road Improvement District, 266 U. S. 175, the court found that the statute which allowed twenty-eight days after first publication within which a land owner might object to assessment of benefits was valid.

In Security Savings Bank vs. California, 263 U. S. 282, the court held that publication of notice to a depositor in a bank, whose account had not been added to or drawn on for twenty years, for four weeks was a sufficient notice.

In Hamilton vs. Brown, 161 U. S. 256, this court held that due process of law had been given in an escheat proceeding where publication was made under the statute for four weeks.

In the case of McDaniel vs. McElvy, 91 Fla. 770, 51 A. L. R. 731, the court had under consideration a statute providing for notice once a week for four consecutive weeks in a suit to remove cloud from title to real estate. That court in its opinion has cited many cases in upholding such a publication. There seems to be a lack of authorities for any period between the five days in Roller vs. Holly and the four weeks in the above-cited cases. In the conventional civil proceeding the laws of the State of Washington require publication once a week for six consecutive weeks with an answer within 60 days of publication (Rem. C. S., 233).

Suits involving assessment for taxes and notice to creditors in bankruptcy proceedings are not in point,

as the length of notice is necessarily shortened due to the character of the action and the obvious necessity of the case.

This court said in the case of Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 239, said:

> "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under eminent domain."

The reasoning in the case of Roller vs. Holly, *supra,* seems to apply very strongly to the case at bar, the court there saying:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice, there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

The court then, after commenting upon the fact that an ordinary summons contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and preparation of his defense, states that there is a consensus of opinion in the statutes of several states which is entitled to great weight in passing upon the question of the reasonableness of such notice, and after reviewing the statutes of many states, proceeds to say:

> "It may be said in general, with reference to these statutes that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and the return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient."

In the case of Wuchter vs. Pitzzutti, 276 U. S. 13, this court had under consideration a statute, which it declared denied due process of law, because it failed to contain a provision making it reasonably probable that notice of service on the Secretary of the state would be communicated to a nonresident defendant, and the court cited with approval the case of McDonald vs. Mabee, 243 U. S. 90, which calls attention to the fact that the foundation of jurisdiction is physical power and says:

> "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

What were the probabilities with regard to a publication in the City of Wenatchee, Washington, giving notice to Miss Wick of the proceeding affecting her property? If the first issue of the newspaper containing the publication had been at once mailed to Miss Wick, she would not have received it in the ordinary course of mail until the sixth following day, and then, if she had immediately left home and journeyed with all speed to Wenatchee she would not have reached there until the tenth day, not having sufficient time to

have secured counsel and prepared for defense. Furthermore, by the requirement of more than one publication in the newspaper, the legislature had in mind the possibility that the first publication would escape the attention of the land owner, and that Miss Wick would not receive notice of the proceeding until the second publication had been made, and then it was wholly too late for her to have presented herself in court within the fourteen days allowed.

There is one other matter deserving attention in this connection and that is the provision of the statute of the State of Washington which reads, "such publication shall be deemed service upon each of such nonresident person, or persons, whose residence is unknown." This was not cited by the Supreme Court of the State of Washington in its quotation of the statute, and seems to have escaped the attention of that court. The natural inquiry at once presents itself, service of what? It seems clear that it means service of the notice of ten days provided in the preceding portion of the section and thus, service became effective only at the expiration of the publication.

This court has held in the case of Early vs. Homans, 16 How. 610, construing a statute requiring publication of notice in a newspaper, as follows:

> "The proposition 'for,' means of itself duration when it is put in connection with time, and as all of us use it in thtat way in our everyday conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made.
>
> When we say that anything may be done in twelve weeks, or that it shall not be done for

> twelve weeks, as the happening of a fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or, as the case may be, that it shall not be done before."

This case was also considered and the doctrine approved in the case of Leach vs. Burr, 188 U. S. 510. See also the Appeal of Fred W. Meyer, 158, Minn. 433; Market Natl. Bank vs. Pacific Natl. Bank, 89 N. Y. 397; Cox vs. Northern Wisconsin Lumber Co., 82 Wisc. 141; Foster vs. Vehmeyer, 133 Calif. 459; Auerbach vs. Maynard, 26 Minn. 421; Bond vs. Penna. R. R. Co., 124 Minn. 195; State vs. Morrison, 132 Minn. 454.

Whether we take the view adopted by the Supreme Court of the State of Washington that the statute only required publication once a week for two successive weeks and no further notice, or the interpretation that the statute required publication for two successive weeks (fourteen days) and this would constitute service of a notice which was then to run for ten days, the appellant has not received reasonable notice of the pendency of the proceeding and an opportunity to appear in the cause, and has therefore, been deprived of her property without due process of law. If the longer term is fixed by statute, appellant has been deprived of due process by the failure of the court to observe the statute. If the shorter term is fixed by the statute, then the term fixed by the statute of ten days, or fourteen days, does not constitute due process of law, under the facts of this case.

In the case of Chicago R. Co. vs. Chicago, 166 U. S. 226, this court said:

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within

> the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, in referring to the 14th Amendment, had said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation!' "

Appellant submits that the question before the court is not whether eighteens days' notice is a reasonable one, but whether the statute of the State of Washington as interpreted by the Supreme Court of that state and upheld in this case, providing as it does for a notice of only ten days to be published once a week for two successive weeks, is a reasonable notice to her living as she did at such a distance from the court.

2. *Whether the Purpose of the Taking Constituted a Public Use.*

Specification of Assigned Errors, Nos. 4 and 5. Assignments of Error II and IX.

One of the findings of fact to which attention has heretofore been called was as follows: "The electric energy to be generated in the new plant will be delivered to the Washington Water Power Co. at the switchboard of said new plant for transmission by the Washington Water Power Co. to its customers in the State of Washington" (R. 56).

From this it is apparent that the Chelan Electric Company is not to have any customers of its own except the Washington Water Power Co. All of its generated electric energy is to be disposed of by it under contract to the Washington Water Power Co. If the public desires to obtain any benefit from this development of water power, it must do so as customers of the Washington Water Powre Co. and not as customers of the Chelan Electric Company. The question at once suggests itself, is the Chelan Electric Company condemning this land for a public use, or for its own profit derived from sale to the Washington Water Power Co.? The Chelan Electric Company has no transmission lines but is delivering the products on its own premises "at the switchboard of said new plant," much after the manner of a cash and carry merchant. Those who desire to obtain power from the Chelan Electric Company must be situated as the Washington Water Power Co. is with a transmission line. To obtain such a transmission line the permission of the state would have to be obtained, and even if the state would grant such permission, any number of transmission lines of users of electricity would shortly create a public nuisance. Furthermore, the cost would be prohibitive to any ordinary customer. It is, therefore apparent that any right on the part of the general public to utilize the current generated by the Chelan Electric Company is illusory and non-existent.

We have, therefore, the case of an electric power producing company generating power to be disposed of to another corporation for its own profit, and under such conditions that the general public cannot avail itself of the right to purchase power from such producing power company. It goes without saying that there will be a profit to the Chelan Electric Company

paid by the Washington Water Power Co. The question presented in the case is, does a condemnation of land by the electric power producing company, under these circumstances, amount to a taking of the land for a public use or the taking of land for its own private use. The record discloses no way in which the public can use the power produced except by purchasing the same from the Washington Water Power Co. In purchasing this power the general public must pay rates which will allow the Washington Water Power Co. a fair return on its investment including the capital invested in six other power stations, and it must also pay a separate and distinct profit upon the same electric energy for the benefit of the Chelan Electric Company. The rates to consumers will not be based upon the cost of the power to the Chelan Electric Co., including a fair return on its investment, but will be based on the cost to the Washington Water Power Co.

We feel that the court will take judicial notice of the fact that the creation of controlled producing companies and other corporations holding the stock of such controlled companies, is a common device for increasing the profits to the ultimate owner of the stock, not for the benefit of the public.

The Chelan Electric Company and the Washington Water Power Co. were two distinct and separate corporations, and while the Chelan Electric Company has been chartered in the State of Washington as a public service corporation, the finding of fact made by the court when analyzed, indicates that this was merely a cloak that it has assumed, and that its real purpose is not to engage in business as a public service corporation but as a corporation serving exclusively one customer for its own private profit and advantage. This is clearly demonstrated by the finding of fact made in

the cause with reference to the Washington Water Power Company which was not a party to the proceeding and with regard to which there need have been no finding of fact (R. 54-56).

We deem it conclusively shown that the Chelan Electric Company did not intend to serve the public at large by the finding of fact that all deliveries of its generated current were to be made at its own switch board, it lacking entirely any facilities for delivering electric current to the general public.

While there is some difference among the authorities as to whether the term "public use" in the law of eminent domain, means use by the general public, or is equivalent to public benefit, convenience or welfare, there is a strong weight of authority that to make the use a public one, for which the power of eminent domain may be exercised, there must be a right on the part of the public, independent of the mere will or caprice of the owner, to the use of the property.

In Shasta Power Co. vs. Walker, 149 Fed. 568, it was stated to be the law that to entitle a private corporation to exercise the special right of eminent domain the use which formed the basis for the application therefor must be such as would subserve the public in some appreciable way, and be such as it might demand in service as of right, and that it was not sufficient that contemplated improvement would operate as a benefit to the community or property holders thereof, but the service proposed must be such that every individual member of the community similarly situated shall have the right to demand and receive upon like condition as any other member. The Circuit Court of Appeals affirmed the judgment in this case, 160 Fed. 856.

The law as announced in the State of Washington is to the same effect. State vs. White River Power Company, 39 Wash. 648; 4 Ann. Cas. 987. The Court cites with approval the following extract from Lewis on Eminent Domain, Sec. 165:

> "Public use means the same as use by the public, and that, it seems to us, is the construction the words should receive in the constitutional provision in question."

In harmony with this rule are the cases of Gravelly Ford Canal Co. vs. Pope & T. Land Co., 136 Cal. App. 556; Sholl vs. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379; Cleveland, C. C. & St. L. R. Co. vs. Polecat Drainage District, 213 Ill. 83; Great Western Natural Gas Co. vs. Hawkins, 30 Ind. App. 567; Howard Mills Co. vs. Schwartz Lumber Co., 77 Kan. 599, 18 L. R. A. (N. S.) 356; Chesapeake Stone Co. vs. Moreland, 126 Ky. 656, 16 L. R. A. (N. S.) 479; Arsnkerger vs. Crawford, 101 Md. 247, 70 L. R. A. 497; Board of Health vs. Van Hoesen, 87 Mich. 533, 14 L. R. A. 114; Minnesota Canal & Power Co. vs. Koochiching Co., 97 Minn. 429, 7 Ann. Cas. 1182; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; In re New York, 135 N. Y. 253, 31 A. S. R. 825; Jacobs vs. Clearview Water Supply Co., 220 Pa. 388, 21 L. R. A. (N. S.) 410; Borden vs. Trespalacios Rice & Irrig. Co., 98 Tex. 494, 107 A. S. R. 640 (affirmed without opinion 204 U. S. 667); State ex rel. Harris vs. Superior Ct., 42 Wash. 660, 7 Ann. Cas. 748; Hench vs. Pritt, 62 W. Va. 271, 125 A. S. R. 966, and cases cited in monograph note 54 A. L. R. 7.

Attention of the Court is called to a well written monographic note on the subject "Uses for Which the Power of Eminent Domain Can Not Be Exercised," 102 A. S. R. 809.

This Court has recognized the rule that property of an individual cannot be taken by eminent domain for the private use of another.

In Charles River Bridge vs. Warren, 11 Pet. 420, it was said:

> "Although the sovereign power in free governments may appropriate all the property, public as well as private for public purposes making compensation therefor, yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of 'A' and give it to 'B' by the right of eminent domain, or that it can take it at all except for public purposes."

In Kaukauna Water Power Co. vs. Green Bay, etc., Canal Co., 142 U. S. 254, this Court said:

> "Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

And in the case of Missouri Pacific Ry. Co. vs. Nebraska, 164 U. S. 403, the opinion states:

> "To require the railroad company to grant to the petitioners a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company against its will, to transfer an estate in part of the land which

> it owns and holds, under its charter as its private property, and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit. * * *"

This Court also by affirming without an opinion the case of Borden vs. Trespalacios Rice & Irrig. Co., 98 Tex. 494, seems to have given its approval to that decision in which it is said:

> "Any citizen, whose property is sought to be taken in aid of a given enterprise is to have a hearing in which the question of whether or not the use to which the property is to be devoted is a public one, may be fully considered, and if it be found that such is not a character of the use, the statute does not authorize, and the Constitution forbids the taking."

In the case of Hendersonville Light & Power Co. vs. Blue Ridge Interurban Railway Co., 243 U. S. 563, and the case of Mount Vernon-Woodbury Cotton Duck Co. vs. Alabama Interstate Power Co., 240 U. S. 30, the Court has indicated that if the use was private the taking would be void.

The case of Clark vs. Nash, 198 U. S. 361, does not depart from this rule except to the extent of pointing out that the test of the use by the general public is an inadequate test where special circumstances exist which require some concessions from the otherwise inflexible rights of individuals. The Court was careful to assert that it did not desire to be understood as approving the broad proposition that private property may be taken in all cases where the taking might promote the public interest, or develop the natural resources of the State.

In Strickley vs. Highland Boy Mining Co., 200 U. S. 527, was presented a case of circumstances exceptional in character, which required concessions from individuals which, under other circumstances, they would not be required to make, as did also the case of Hairston vs. Danville & W. Ry. Co., 208 U. S. 598.

There were no exceptional circumstances in this case. If the land had been sought to be condemned by a public service corporation which proposed to furnish its electric energy to all persons desiring to purchase it, so that a right existed in each member of the public to demand service for all purposes, there would be no objection to the condemnation on this ground.

A consideration of the facts found by the Court indicates that the Washington Water Power Co. when it purchased this electric energy from the Chelan Electric Company intended to transmit it into the State of Idaho, notwithstanding the contrary conclusion of the court of Chelan County.

It is found as a fact that the Washington Water Power Co. sold in Idaho, during the period from July 1st to December 1, 1926, 54,800,000 kilowatt hours, and its plant, located in Idaho, had generated and sold during the same period, 17,600,000 kilowatt hours (R. 56). During the twelve months period in the year 1925, it sold in Idaho approximately 114,000,000 kilowatt hours, and during the twelve months period in the year 1926, it sold in Idaho 128,600,000 kilowatt hours. During the twelve months period in the year 1925, it generated in Idaho 48,650,000 kilowatt hours (R. 57). What was used in Idaho in excess of production in that State came from plants in the State of Washington. The Washington Water Power Co. contemplates selling electric energy necessary for the operation of a zinc

plant in Northern Idaho, which when constructed will consume 80,000,000 kilowatt hours during a calendar year (R. 56). There is no finding of fact as to how much electricity will be generated by the plant of the Chelan Electric Co. from the project for which this land is taken, and it is a fair assumption that the purpose of the new development by the Chelan Electric Co., was to furnish this electric energy. The Washington Water Power Co.'s transmission lines were all connected together, and there appears to have been a free flow of electric energy from the State of Washington into the State of Idaho. The only increase in production facilities shown was this plant of the Chelan Electric Co. Simultaneously with the erection of this plant there is a demand for an additional 80,000,000 kilowatt hours to operate a zinc plant in Idaho.

It is submitted that sale outside of the State of Washington is not a public use for which the power of eminent domain could be exercised under the authority of that State.

In no case which has been found by counsel in their examination has it been decided that a corporation can condemn land for the purpose of generating electricity, all of which it has contracted to sell an individual subscriber, and none of which can be utilized by the public by a direct purchase from the condemning corporation, but only by purchase from its vendee after the payment of the tax or toll levied, by reason of the existence of the two separate corporations. The viciousness of this is obvious.

The scheme involved is a commercial one without benefit to the public, in which the public can not participate, and which produces a profit to the Chelan Electric Company, and through the added profit to be

paid to the Chelan Electric Company, is to the disadvantage of the public. Each time a holding company, distributing company, operating company or a producing company is inserted in the progress of the development of water power into electric energy, between the water fall and the electric motor, the cost to the ultimate consumer is increased.

3. *Where the Proceedings Otherwise Defective to the Extent That They Failed to Constitute Due Process of Law?*

Specification of Assigned Errors Nos. 6, 7, 8, 9 and 10. Assignments of Error I, II, III, XII, XIII, XIV, XV and XVI.

We urge these assignments of error in view of the Act of February 13, 1925 (43 Stat. 936), providing that the writ of error to the highest court of a state shall have the same effect as if the judgment or decree had been rendered or passd in a court of the United States (Sec. 237a), and that a proceedings by way of writ of error (appeal) instead of by certiorari, shall not be dismissed upon this ground, but shall be regarded and acted upon as a petition for certiorari (Sec. 237c).

The land described in the petition comprised all of the entire holding of land of Miss Wick in Chelan County, the vastly greater portion of which was unaffected by the condemnation proceeding, and she was left to determine, without any guide or aid from the petition, which portion of her land they sought to condemn, other than the indefinite statement that it was necessary to raise the waters of Cheland Lake and the Chelan River to a maximum elevation of 1,100 feet above mean sea level, and to inundate her land to this

maximum elevation. The statute (Appendix 55) required "a description of the land" sought to be appropriated. There was a flagrant disregard of this statute in the petition. This defect was jurisdictional and was not cured by the refusal of the court to make it more definite and certain when Miss Wick applied by motion to that end (R. 39, 42), or by a bill of particulars filed after the determination of public use and necessity had been made (R. 75). A bill of particulars is no part of a petition or pleading and therefore could not cure the defect of inadequate description in the petition. Duval vs. Duval, 29 Wash. 528.

The order to make more definite and certain of March 23, 1927, was not made with reference to case No. 7391, which was the case relating to appellant's land, as will appear from the order (R. 43).

It would seem to be a fundamental requirement of due process of law that the land owner would be advised from the filing of the petition just exactly what portion of his land was sought to be taken from him for public use. The description should be as accurate as that required in the case of a deed of land. It should be sufficiently accurate to enable a surveyor taking the description to locate the parcel described without the aid of extrinsic evidence. (Nichols on Eminent Domain, Sec. 399.)

In the case of State *ex rel.* Oregon vs. Superior Court, 45 Wash. 321, the Supreme Court of the State of Washington has recognized the well-settled rule that where land has not been described with reasonable certainty the court acquires no jurisdiction in the condemnation proceeding.

In the case of State *ex rel.* Patterson vs. Superior Court, 102 Wash. 331, the court said:

> "Petitioner should be required to describe the land sought to be appropriated with all the certainty that is possible, in order to determine the land appropriated and condemned by actual survey. It is necessary also, in order that a jury of condemnation may know how much land is appropriated and to be paid for."

Where lands are to be taken or covered with overflow of water, it is entirely practicable to describe them accurately by metes and bounds. *In re* Roe, 111 N. Y. S. 755; City of Helena vs. Rogan, 26 Mont. 452, 68 Pac. 728.

To the effect that the description must be given with such reasonable certainty that a surveyor can locate the land without extrinsic evidence, see also 2 Lewis on Eminent Domain (2d. Ed.), Sec. 307, and cases cited: People *ex rel.* Eckerson vs. Haverstraw, 137 N. Y. 88; Lexington Print Works vs. Canton, 167 Mass. 341.

After the petition was filed, it developed that the petitioner was seeking something that had not been mentioned in his petition, namely, that the elevation of 1,100 feet was to be at the time of still water, and in addition to the right of flowing to this height at still water measurement, there was to be imposed upon the land owned by appellant an additional servitude arising from wave wash and erosion of the land at times when the surface of the lake was disturbed and the water kicked up by the wind.

Accordingly, although no mention thereof was made in the petition, the judgment on the verdict (R. 127) conferred upon the Chelan Electric Company "the right in perpetuity to inundate and overflow by impounding the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation

of 1,100 feet still water measurement, above mean sea level, and to damage the land herein described, and all lands of the respondent, Alice Barbee Wick, lying contiguous or adjacent thereto, by wave wash, erosion, seepage, inundation, or any similar cause, as a result of holding the waters to said elevation."

This was also in excess of any right granted by the Federal Power Commission under whose license the Chelan Electric Company claimed to be acting (R. 157). The case presented to the jury of condemnation was not the case set up in the petition filed. To award the taking of land not called for in the petition is a taking without due process of law.

The instructions to the jury granted by the court, thirty-seven in number, were long, complicated and argumentative, and did not fairly set forth to the jury that the land owner was entitled to the fair market value of his property for the best use for which it was available.

In Instruction No. 6 the jury were advised that the Chelan Electric Company had already acquired, through purchase, the major portion of the property necessary for the power development (R. 101).

In Instruction No. 7 the jury was told that the petitioner was not seeking a fee simple title but only an easement to overflow and inundate the land to an elevation of 1,100 feet above mean sea level, and that the owner would retain all rights and privileges incident to ownership of real property not inconsistent with this right (R. 102).

In Instruction No. 16 the jury was charged that the petitioner sought to inundate to an elevation of 1,100 feet still water measurement, together with the right to damage the respondent's land by wave wash, erosion, seepage, etc. (R. 104). These are contradictory.

In Instruction No. 17 the jury was told that "it is not intended that compensation shall extend to loss or injury which the land owner did not have at the time of taking." Yet this was the case of an easement, and the loss or injury to be compensated for was in part the loss by reason of the flooding of the land with water that had yet to take place.

No understandable definition of "fair market value" was given, nor were the jury told that the payment should be ascertained with regard to the best use for which the land was available.

Instructions Nos. 19, 20, 21, 22 and 23 reiterated the point of view of the Chelan Electric Company in slightly different language, and were apt to convey to the jury the idea that the court favored the contention of the petitioner.

Instructions Nos. 18 and 24 repeat the same idea as to a forced sale, but Instruction No. 24 gives a wholly wrong statement of the law when it says: "In no event can you consider the evidence based on the storage capacity of the lake, or what it may be worth to the petitioner for reservoir or other purposes." We respectfully submit that the storage capacity of the lake was a decisive element of the value of the land to be taken.

Both Instructions No. 31 and No. 33 contain a statement that the jury may disregard the evidence of any witness who has sworn falsely in the case. There could be no possible excuse for two instructions on this point.

On the other hand, instructions offered on behalf of the respondent (R. 96) set out adequately the law in the case and should not have been refused.

These several items of error considered under this portion of our brief show that appellant did not have

accorded to her the impartial decision of substantial questions raised in the case, and the benefit of a decision of a jury directed impartially, and acting upon the petition to which appellant was made a party; and we submit that she was thereby denied her rights under the Federal Constitution.

4. *Whether the Tax Statutes Are in Conflict with the Constitution of the United States.*

Specification of Assigned Errors Nos. 11 and 12. Assignments of Error IV, V, VI, X, XI and XII.

The appellant also attacks the validity of the statute providing that taxes upon real estate are a lien upon the land for one year before they are permitted to be paid. Under the law, taxes assessed upon real property were a lien thereon from and including the first day of March in the year in which they were levied (in this case 1926) until the same were paid, but as between grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. The County Treasurer is prohibited from collecting taxes or issuing receipts for the same before the first Monday of February following the year in which they are assessed. Therefore, at the time the proceedings were instituted an assessment of taxes against the land had been made for the year 1927, which became a lien the first day of March, 1926, but which could not have been paid before the first Monday of February, 1927, and which, as between grantor and grantee, would not attach to the land until the first Monday of February, 1927.

The law of the State of Washington providing for the payment of taxes is as follows:

"The assessment year contemplated in this chapter shall commence on the first day of March and end on the last day of February in each year and the fiscal year contemplated in this chapter shall commence on January first and end on December thirty-first of each year. "* * * The amount of said tax due upon such books shall be charged to the treasurer in an account to be designated as treasurer's 'Tax-roll Account' * * * Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such tax upon said assessment-rolls before the first Monday of said February following. * * *

"The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. * * *"

The whole purpose of condemnation was to effect a change of title from Miss Wick to the Chelan Electric Company. An estate in lands was to pass by alienation from Miss Wick to the petitioner, and a privity of estate necessarily existed between them when this was effected. While it was an involuntary conveyance, it was a conveyance nevertheless, and if the proceeding was being lawfully conducted it would result in the alienation of title from appellant and the acquiring of title by appellee. A proceeding to condemn land is in substance a proceeding to compel a sale between owner to petitioner. Atlanta, etc., R. Co. vs. Southern R. Co., 131 Fed. 657. Certiorari denied, 195 U. S. 634.

In the case of Manion vs. Louisville, etc., R. Co., 90 Ky. 491, it was said:

> "The owner may become, and is in fact made, the involuntary vendor of his land under the exercise of this sovereign power."

The reason why the statute provided that the lien was not to attach as between grantor and grantee until the first Monday of February of the succeeding year is evident. It was to require the payment of the taxes by the one who was the owner of the property at the time when the payment became payable. In a settlement between grantor and grantee before the first Monday of February, 1927, no deduction of the purchase price would be made by reason of the lien of the taxes, but in such settlement after the first Monday of February. 1927, there would have been such deduction because as of that date the lien had attached. So in a condemnation proceeding in award for damages for the land taken, nothing could have been lawfully deducted from the amount awarded to Miss Wick by reason of this lien prior to the first Monday of February, 1927, on which date the lien attached to her land for purposes of conveyance. If appellant had granted her land to the Chelan Electric Company no lien for taxes would have existed; why should there be a lien in case of condemnation?

The part these laws with relation to the assessment of taxes, and making them a lien on real estate, played in the case was this: The appellant filed a petition for the removal of the cause to the District Court of the United States for the Eastern District, Washington, gave bond and served due notice upon the attorneys for the petitioner. The court of Chelan County, notwithstanding the objection made by petitioner to the removal, signed an order removing the case as prayed (R. 25).

Thereupon, the Chelan Electric Company moved to remand the cause, filing therewith affidavits of various persons. The principal ground of this motion was that taxes assessed against the land were a lien upon it in favor of Chelan County, and that Chelan County was therefore a necessary and indispensible party. This contention was sustained by the Supreme Court of the State of Washington in its opinion (R. 145), where it says:

> "The relator, Alice Barbee Wick, is, and was, a resident of Philadelphia, Pennsylvania, and error is assigned on her behalf to the effect that the County of Chelan was improperly made a joint defendant with her, having the effect, it is claimed, of depriving her of the right to a removal of her case to the federal court on account of diverse citizenship. Two answers may be made: First, at the time the action was commenced general taxes due the county were outstanding and a lien upon the property, and Rem. Comp. Stat., Sec. 921 (P. C. Sec. 7646), requires a petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property, and Rem. Comp. Stat., Sec. 922 (P. C. Sec. 7647), requires that a notice of such petition be served on each and every such person; and, second, the record shows that, prior to the hearing herein by the trial court, relator Wick did remove the case against her to the federal court and, upon a hearing therein, that court promptly remanded the cause to the state court, from which order of the federal court it appears no appeal was prosecuted nor review sought or had."

The court appears to have paid but slight attention to the provision that as between grantor and grantee

such lien should not attach until the first Monday of February of the succeeding year, and the appellant contends that so far as this condemnation proceeding is concerned, between the Chelan Electric Company on one hand, seeking to acquire property through a proceeding in eminent domain, and the appellant, the owner of the property, on the other hand, there exists a relationship which was identical, so far the property to be condemned is concerned, with the conventional relationship that exists between grantor and grantee, and that, therefore, under the provision of the law in question, there is no lien upon the property on the date the petition was filed, and the Chelan County was not necessary, indispensible or even a proper party to the proceeding.

In holding that the County of Chelan was a proper party and properly joined as a defendant with appellant because general taxes due the County were outstanding and a lien upon the property under the law and Rem. Comp. Stat., Sec. 921 (P. C. Sec. 7646) required a petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested, as in the quotation from the decision of the Supreme Court of the State of Washington just cited above, that court has made the tax statutes of the State of Washington conflict with the constitutional rights of petitioner, and has deprived the Federal Court of jurisdiction over cases given to it by the Constitution of the United States, Art. III, Sec. 2, and of which it has jurisdiction under the U. S. Judicial Code, Title 28.

Jurisdiction of Federal Courts because of diversity of citizenship, or the right of removal to a Federal Court, under Constitution, Art III, Sec. 2, and Judi-

cial Code, Secs. 24 and 28, cannot be defeated by joining formal or unnecessary parties.

Salem Trust Co. vs. Manufacturers Finance Co., 264 U. S. 182.

After the proof produced at the hearing held June 23, 1927, and on subsequent days, failed to show any interest in Chelan County, or any reason for it being joined as a party to the proceeding, appellant again presented a petition and bond in open court, copies of which were served on the attorneys for the Chelan Electric Company, and requested the judge at that period of the case to file an order removing the cause to the Federal Court. This was refused (R. 92), and upon the appeal to the Supreme Court of the State of Washington, the matter was considered and the court said:

> "The Federal Statutes, Sec. 29 of the U. S. Judicial Code (Sec. 72, Title 28, of the U. S. Code Ann.) requires that written notice of the petition and bond for removal shall be given the adverse party or parties prior to filing the same. This was not done.
>
> "The application was neither properly nor timely made.
>
> "The Supreme Court of the United States has held that a case arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by a voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of

defendants, by the voluntary dismissal or nonsuit by him of a party or parties defendant." Great Northern R. Co. vs. Alexander, 246 U. S. 276.

The Alexander case is not controlling of the case at bar. It was a complaint under the Federal Employers' Liability Act in which there was a prohibition against removal, by an amendment approved April 5, 1910. We have not such a case here. This case is one in which the County of Chelan, a wholly unnecessary and improper party, was joined as defendant. The cause should have been removed and should not have been remanded to the State court. It was properly a cause of which the United States courts had jurisdiction under the Constitution of the United States. There was no relief sought against Chelan County; no substantial allegation in the petition relating to it; and there was no reason why it should have been added as a party unless this action was justified by the tax law above referred to. The action of the court in holding it as a party is a finding that the statute made the Chelan County an indispensible party, and if it did so, it is void under the Constitution of the United States.

As we read the decisions of this court, where a wholly unnecessary party has been joined as a defendant in a cause against whom no relief is prayed, he will be disregarded. Barney vs. Latham, 103 U. S. 205; New Jersey Central R. Co. vs. Mills, 113 U. S. 249; Coney vs. Winchell, 116 U. S. 227; Geer vs. Mathieson Alkali Works, 190 U. S. 428; Wilson vs. Republic Iron & Steel Co., 257 U. S. 92; Niles Bement & Pond Co. vs. Iron Moulders Union, 254 U. S. 77.

On its face the petition did not disclose any interest

on the part of Chelan County, and at the hearing no interest was shown to have existed, and in the thirty-seven instructions to the jury nothing was said as to any interest of Chelan County. It is only by a reference to the law making taxes a lien on the land from the date of their assessment that there is any shadow for contending that Chelan County could have been joined in the condemnation proceedings, and when this statute is examined it will be seen that it excludes from the effect of the lien, in terms, transactions between grantor and grantee, until after the taxes may be paid. A petition for removal is not filed too late if it is filed as soon as the case became a removable one. Remington vs. Central Pac. R. R. Co., 198 U. S. 95. If not removable when the first petition of appellant was filed, it became so when the evidence in the case disclosed no interest on the part of Chelan County in the land.

As it is held that Chelan County is a necessary and indispensible party to the condemnation proceeding under the statute of the State of Washington, the appellant submits that the statute requiring this is invalid because it prevents her from removing her cause to the Federal Court which, under the Constitution of the United States, had jurisdiction of the cause, and also deprives her of her property without due process of law, due process of law in such case requiring that she be afforded the opportunity for removal of the case to the proper Federal Court.

But even conceding for argument that the statute created a lien on the land, there is no reason why Chelan County should have been made a party to the condemnation proceeding. Under a prior decision of the Supreme Court of the State of Washington, the

county's lien for unpaid taxes is not a basis for making the county a party to condemnation proceedings in that State. Gasaway vs. Seattle, 52 Wash. 444.

In this proceeding only an easement in a portion of the land was ultimately taken by the Chelan Electric Company. The lien for taxes which attached to Miss Wick's land did not attach to the easement which they sought and which easement was in no way affected by a lien for taxes.

For the reasons set out, we feel that the appellant has been deprived of her property without due process of law, and she accordingly requests that the errors in the Supreme Court of the State of Washington may be corrected, and that the judgment in the cause may be reversed.

Respectfully submitted,

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APPENDIX

Remington's Compiled Statutes of Washington, 1922

SEC. 921. *Eminent Domain by Corporations—Petition, Requisites of.* Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, *a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof (Cf. L. '88, p. 58, sec. 1; L. '90, p. 294, sec. 1; 2 H. C., sec. 648).

SEC. 922. *Notice, Contents of and Service.*—A notice, stating briefly the objects of the petition, *and containing a description of* THE LAND, REAL ESTATE, PREMISES OR PROPERTY SOUGHT TO BE APPROPRIATED, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be

served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other directors or trustee of such corporation. In case of minors or (on) their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is (state, school) or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated. *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which*

lies the land sought to be appropriated. And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this article are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this article may be made as the superior court, or the judge thereof, may direct. (Cf. L. '88, p. 58, Sec. 2; L. '90, p. 295, sec. 2; 2 H. C., Sec. 649.)

* * * * * * * * *

Sec. 925. *Court to Adjudicate Necessity for Appropriation—Calling Jury.* At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity,

and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, sec. 4; L. '90, p. 297, sec. 4; 2 H. C., sec 651; L. '97, p. 63, sec. 1.)

SEC. 927. *Judgment and Decree of Appropriation.*—At the time of rendering judgment for damages, whether upon default or trial if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this article provided. (Cf. L. '90, p. 298, sec. 6; L. '91, p. 84, sec. 1; 2 H. C. Sec. 653.)

* * * * * * * * *

SEC. 929. *Payment to Petitioner—On Appeal Money to Remain in Court.*—Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, the petitioner, or any officer of or any other

person duly appointed by said corporation, may make payment of the damages assessed the parties entitled to the same, and of the costs of the proceeding, by depositing the same with the clerk of said supreme court to be paid out under the direction of the court or judge thereof and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. (L. '90, p. 299, Sec. 7; 2 H. C. Sec. 654.)

* * * * * * * * *

SEC. 931. *Appeal.*—Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, *and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal:* Provided, however, that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, *but in case the corporation appropriating such land, real estate, premises, or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed and approved in the same manner:* And provided further, that if the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the

supreme court, and final judgment by default may be rendered in the superior court as in other cases. (Cf. L. '88, p. 61, sec. 9; L. '90, p. 300, sec. 9.)

Sec. 932. *Prosecution of Work Pending Appeal.*—The construction of any railway surface tramway, elevated cable tramway, or canal, or *the prosecution of any works or improvements by any corporation as aforesaid shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy.* (Cf. L. '88, p. 62, sec. 10; L. '90, p. 300, sec. 10; 2 H. C. sec. 657; L. '97, p. 64, sec. 2.)

Tax Laws.

Sec. 11235, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9213, Edition of 1915):

> "For the purpose of raising a revenue for the state, county indebtedness, county current expenses, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment-roll, sufficient for such purposes; * * *" (L. '03, p. 339, sec. 1; Cf. L. '93, p. 361, sec. 64; L. '97, p. 167, sec. 63.)

[Note: This was re-enacted L. '25, Ex. Ses., p. 277, Chap. 130, Sec. 77, as follows:

> "For the purpose of raising revenue for state, county and other taxing district purposes, the

board of county commissioners of each county at its October session, and all other officials or boards authorized by law to levy taxes for taxing district purposes, shall levy taxes on all the taxable property in the county or district, as the case may be, sufficient for such purposes • • •"] Sec. 11097-77, Remington's Compiled Stat., 1927 Supp.

Sec. 11239, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9216, Edition of 1915):

"The assessment year contemplated in this (chapter) shall commence on the first day of March and end on the last day of February in each year, and the fiscal year contemplated in this (chapter) shall commence on January first and end on December thirty-first of each year." (Cf. L. '93, p. 352, sec. 67; L. '97, p. 168, sec. 66.)

[Note: Re-enacted L. '25, Ex. Ses., p. 280, Chap. 130, sec. 81, with the change of the word "chapter" in the two places in which it occurs to the word "act."] Sec. 11097-81, Remington's Compiled Stat., 1927 Supp.

Sec. 11241, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9218, Edition of 1915):

"On the first Monday of January next succeeding the date of the levying of taxes, the county auditor shall deliver to the county treasurer the tax rolls of his county, with his warrant thereto attached, and taking his receipt therefor, and charge the county treasurer therewith, and keep an account thereof in the manner required by law." (L. '09, p. 819, sec. 5.)

Sec. 11240, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9217, Edition of 1915):

> "* * * The amount of said taxes due upon such books shall be charged to the treasurer in an account to be designated as treasurer's "Tax-roll account" for....., and said books with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment-rolls before the first Monday of said February following." (Cf. L. '93, p. 353, sec. 68; L. '97, p. 168, sec. 67.)

[Note: These last two sections were re-enacted, L. '25, Ex. Ses., p. 280, Chap. 130, Sec. 82, as follows:

> "On the first Monday of January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for....., and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes

upon said assessment rolls before the first Monday in said February following."] Sec. 11097-82, Remington's Compiled Stats., 1927 Supp.

Sec. 11252, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9219, Edition of 1915):

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax rolls of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of twelve per cent per annum shall be charged upon said unpaid taxes from date of delinquency until paid: Provided, however, that when the total amount of tax payable by one person is two dollars or more, then if one-half of such tax be paid on or before said thirty-first day of May, then the time of payment of the remainder thereof shall be extended and said remainder shall be due and payable on or before the thirtieth day of November following; but if the remaining one-half of such tax be not paid on or before the thirtieth day of November, then such remaining one-half shall be delinquent, and interest at the rate of twelve per cent per annum shall be charged thereon from the first day of June preceding until paid: Provided further, there shall be an allowance of three per cent rebate to all payers of tax who shall pay the taxes on real property in one payment and in full on or be-

fore the fifteenth day of March next prior to the date of delinquency. All rebates allowed under this section shall be charged to the county current expense fund and all collections from penalties and interest on delinquent taxes shall be credited to the current expense fund. (L. '17, p. 582, sec. 1; L. '99, p. 290, sec. 6; Cf. L. '93, p. 353, sec. 69; L. '95, p. 513, sec. 14; L. '97, p. 169, sec. 68.) Re-enacted verbatim—L. '25, Ex. Ses., p. 281, sec. 83. Sec. 11097-83, Remington's Compiled Stat., 1927 Supp.

Sec. 11267. Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9230, Edition of 1915).

"All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real (estate) upon which they may hereafter be imposed or assessed, which liens shall include all charges and expenses of and concerning the said taxes which, by the provisions of this (chapter) are directed to be made. The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real (estate) may become charged or liable." (Cf. L. '93, p. 358, sec. 79; L. '95, p. 516, sec. 19; L. '97, p. 174, sec. 78.)

[Note: Re-enacted L. '25, Ex. Ses., p. 291, Chap. 130, Sec. 99, with the change of the word "estate" in the two places where it occurs to the word "property," and the change of the word "chapter" to the word "act."] Sec. 11097-99, Remington's Compiled Stats., 1927 Supp.

Sec. 11272. Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9235, Edition of 1915):

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property." (L. '03, p. 74, sec. 3, Cf. L. '93, p. 361, sec. 88; L. '95, p. 520, sec. 21; L. '97, p. 176, sec. 83)

[Note: Re-enacted L. '25, Ex. Ses., p. 293, Chap. 130, sec. 104, as follows:

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year. The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which the same is listed with and valued by the county assessor, and no sale or transfer of such personal property shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, dis-

trained by the sheriff as provided in Section 86 of this act, from and after the date of distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the county treasurer and designated and charged upon the tax rolls as provided in Section 112 of this act from and after the date of such selection and charge, and no sale or transfer of such real property so selected shall in any way affect the lien for such personal property taxes upon such property."] Sec. 11097-104, Remington's Compiled Stats., 1927 Supp.